IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL DAVID WAYNE LANGE, Appellant.	No. 37501-0-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Michael Lange appeals his unlawful possession of a controlled substance, methamphetamine conviction.[1] He contends that his conviction must be reversed because he proved that his possession was unwitting. He also argues that the prosecutor's closing argument denied him a fair trial and the court therefore erred in refusing to grant his motion for a mistrial. The State challenges the propriety of the unwitting possession instruction given by the court. However, it did not file notice of cross-appeal as required by RAP 5.1(d), and we decline to consider this issue. Finding no merit in Lange's claims, we affirm.

FACTS

Thurston County Sheriff's Deputy Alan Clark arrested Lange on September 13, 2007, for driving while his license was suspended. During the search of Lange's person incident to arrest,[2]

[1] A commissioner of this court considered the matter pursuant to RAP 18.14 and referred it to a panel of judges.

[2] Lange did not move to suppress the evidence. CrR 3.6.

he found a glass pipe and two baggies, all containing small residues of methamphetamine, in the pocket of Lange's coveralls. Clark testified that Lange admitted they were his and said he had forgotten they were in his pocket.

Lange testified that he had last used the pipe four or five days before his arrest and probably put it in his pocket then. On the basis of this testimony, and over the State's objection, defense counsel convinced the trial court to give an unwitting possession instruction. The jury, nevertheless, convicted Lange as charged.

ANALYSIS

Lange argues that his testimony that he forgot about the drug paraphernalia was sufficient to establish unwitting possession. The first problem with this argument is that the jury was not required to believe him. Credibility determinations are their prerogative and an appellate court does not review them. *See State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The second problem is that failing to remember something is not the same as having no knowledge of it. Lange freely admitted that he intended to, and did, possess the pipe and methamphetamine four to five days before it was discovered in his coveralls. That intent was not discontinued simply because he forgot about the objects he had deliberately possessed. *See State v. Perry*, 10 Wn. App. 159, 162-63, 516 P.2d 1104 (1973) (reasoning that intent to possess need not be specific, but may be merely general, not necessarily requiring continuous or present knowledge of the particular thing possessed), *review denied*, 83 Wn.2d 1011 (1974).

Washington courts have adopted the unwitting possession defense in order to ameliorate the harshness of the almost strict criminal liability imposed by RCW 69.50 4013. *See State v. Cleppe*, 96 Wn.2d 373, 380-81, 635 P.2d 435 (1981), *cert. denied*, 456 U.S. 1006 (1982). The

defense is based on the premise that possession, although unlawful, should be excused if there was no culpable mental state. *See State v. Staley*, 123 Wn.2d 794, 799-800, 872 P.2d 502 (1994). Lange's lapse of memory does not erase his culpable mental state.

As to his claim of prosecutorial misconduct, Lange points to the prosecutor's comments in closing argument:

> Forgetting and not knowing are two completely different things, and I ask you to apply your common sense and your life experience to that. You know that. Not knowing and forgetting are two different things. What would happen if everybody that possessed drugs just said, Oh, I forgot I had it. I forgot about it. That's ridiculous.

Report of Proceedings (RP) (Mar. 19, 2008) at 82. Lange also objects to statements made in rebuttal. The prosecutor told the jury, "I'll make it simple. Unwitting substance possession is not forgetting you have drugs." RP (Mar. 19, 2008) at 91. She also said, "It's not about people who forget about it. It doesn't apply in this case." RP (Mar. 19, 2008) at 91. Lange first challenges these remarks as incorrect statements of the law. That argument fails on the basis of our determination of the first issue.

Lange also contends that the remarks about the possibility of numerous defendants claiming lapse of memory as a defense were improper under *State v. Bautista-Caldera*, 56 Wn. App. 186, 194-95, 783 P.2d 116 (1989), *review denied*, 114 Wn.2d 1011 (1990). *Bautista-Caldera* involved charges of first degree statutory rape. The prosecutor asked the jury to find the defendant guilty of the lesser included offense if they had doubts about penetration, stating, "do not tell that child that this type of touching is okay, that this is just something that she will have to learn to live with. Let her and children know that you're ready to believe them and [e]nforce the law on their behalf." 56 Wn. App. at 195 (alteration in original; emphasis omitted). The court

held that those remarks improperly appealed to the jury's emotions, asking them to send a message to society. *Bautista-Caldera*, 56 Wn. App. at 195.

A trial court has broad discretion to cure trial irregularities. *State v. Post*, 118 Wn.2d 596, 620, 826 P.2d 172, 837 P.2d 599 (1992). However, it should not grant a mistrial unless the defendant has been so prejudiced that only a new trial will ensure that he is tried fairly. *State v. Roberts*, 142 Wn.2d 471, 533, 14 P.3d 713 (2000). This was not such a case. The challenged argument may have been inartful, but it did no more than emphasize the State's theory that there is a legal distinction regarding culpability between not knowing and simply forgetting. As such, it was not an improper argument designed to appeal to the jury's emotions and asking it to send a message or set policy. The trial court reminded the jury that the law was contained in the instructions and they should disregard arguments not based on the facts and the law. The jury is presumed to follow instructions. *Roberts*, 142 Wn.2d at 533. We agree with the trial court that the circumstances of this case did not require a mistrial.

The judgment is affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

VAN DEREN, C.J.

PENOYAR, J.